

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:)	
)	
International Comparison and Consumer)	
Survey Requirements in the Broadband)	GN Docket No. 09-47
Data Improvement Act)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Deployment of Advanced Telecommunications)	
Capability to All Americans in a Reasonable and)	GN Docket No. 09-137
Timely Fashion and Possible Steps to Accelerate)	
Such Deployment Pursuant to Section 706 of the)	
Telecommunications Act)	

TELECOM MANUFACTURER COMMENTS – NBP PUBLIC NOTICE NO. 13

These Comments respond to the Commission’s request for comment on a study by Harvard’s Berkman Center (the “Berkman Study”). That study concludes that the speed and price of broadband Internet service in the U.S. trails the speed and price of such service in several other developed countries due in part to less extreme regulations in the U.S. requiring facilities-based broadband Internet service providers to permit non-facilities-based providers to compete by using the networks of the facilities-based providers (“open access regulations”). Our Comments assume for sake of argument that the speed and price of broadband Internet service in the U.S. is in fact lower than the speed and price of such service in these other developed countries and that this is partially because of less extreme open access regulations here. We make these assumptions not because we necessarily agree with them but in order to focus on another issue – weighing the benefit against the costs of stronger open access regulations. The FCC could not lawfully impose stronger open access regulations than exist today unless it documents that the benefit of doing so outweighs the cost.¹ As discussed below, we believe that

¹ See, e.g., *AT&T v. Iowa Util. Board*, 525 U.S. 366, 429-30 (1999) (holding that open access regulations must reflect a “balance” between the benefit of increased competition that could result from such regulations and their costs) (Breyer, J., concurring in part and dissenting in part); *U.S. Telecom Ass’n v. FCC*, 290 F.3d 415, 426-28 (D.C. Cir. 2002).

any benefit of marginally higher quality broadband Internet service that would result from stronger open access regulations is outweighed by both (i) the lower network infrastructure innovation and investment that such regulations inevitably would bring about, and (ii) the cost of developing and enforcing such regulations. The position of manufacturing companies like us on the impact of regulatory policy on investment and innovation is entitled to special weight since, as the D.C. Circuit has recognized, “[f]irms that sell goods and services that are *inputs* to the production and use of. . . services stand to gain an expanding market” from new investment and innovation and thus have an “incentive to make a completely unbiased judgment on the matter.”²

DISCUSSION

The Berkman Study is more important for what it does *not* conclude than for what it does. While arguing that stronger open access regulations than exist in the U.S. have the beneficial effect of leading to marginal improvement in the quality of broadband Internet access service, the Study does not refute the FCC’s repeated finding, upheld by the courts, that such regulations also produce a significant social cost in that they create a substantial disincentive for both incumbent network owners and new entrants to invest in network infrastructure.³ If anything, the Study acknowledges that stronger open access regulations would reduce incentives to invest in network infrastructure. For example, it characterizes such regulations as “trading off investment for flexibility” in entering the broadband Internet service market.⁴ Similarly, it

² *U.S. v. Western Elec.*, 993 F.2d 1572, 1582 (D.C. Cir. 1998).

³ See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand, 18 FCC Rcd. 16978 at ¶ 3 (2003) (“[W]e have come to recognize . . . the difficulties and limitations inherent in [facilitating broadband] competition based on the shared use of infrastructure through . . . [open access regulations]. While . . . [open access regulations] can serve to bring competition to markets faster than it might otherwise develop, we are very aware that . . . [it] tend[s] to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology”).

⁴ Berkman Study at 81. While the Study claims that NTT’s investment in its fiber network notwithstanding the requirement that it lease its fiber capacity to competitors shows that “open access [regulation does not deter] [

acknowledges that companies which compete with Germany's Deutsche Telekom ("DT") in the DSL market may have backed down from deploying their own DSL transmission infrastructure because of an open access regulation in Germany which permits competitors to purchase DT's DSL Internet service at a wholesale price for resale to the competitors' retail end user customers.⁵ The Study likewise admits that the U.K.'s open access regulations might have reduced broadband infrastructure investment there.⁶

Not only does the Berkman Study appear to acknowledge what the FCC and U.S. courts have found - that open access regulation creates a serious social cost by reducing incentives to invest in network infrastructure, there also is evidence from countries with stronger open access regulations than exist here that such regulations have in fact hurt infrastructure investment. To cite just one example - when the Japanese government imposed open access regulations requiring facilities-based carriers NTT East and NTT West to sell their copper loop transmission facilities at extremely cheap prices, those companies largely halted investment in copper transmission infrastructure and began investing heavily in fiber optic transmission since Japan's

infrastructure investment" (p. 85), NTT's fiber investment actually shows no such thing for two reasons. First, NTT is roughly 40 percent owned by the Japanese government, and its fiber investment is subsidized in substantial part by that government.. 16 Progress on Point, Issue 16 (July 2009 quoting J Eisenach, Chairman, Empiris LLC (Japan's fiber networks are "essentially government-subsidized build-outs"). Second, whereas the Japanese regulator set extremely low wholesale lease rates for DSL loops, it set lease rates for fiber loops extremely high, substantially reducing the incentive of competitors to compete in the broadband Internet service market by leasing NTT's fiber loops. *See, e.g.*, "Unbundling doesn't work" at 2 (June 18, 2009, quoting a report by R. Atkinson, K. Correa, and Julie Hedlund) ("the price that competitors pay [to lease fiber loops] is quite high, enabling NTT to obtain an adequate rate of return on its fiber investment"). *See also U.S. Telecom. Ass'n v. FCC, supra*, 290 F.3d 415, 428 ("[t]he existence of investment of a specified level [in an environment of open access regulations] tells us little or nothing about incentive effects. The question is how such investment compares with what would have occurred in the absence of the prospect of . . . [open access regulations]").

⁵ Berkman Study at 100.

⁶ *Id.* at 104.

open access regulations permitted NTT East and NTT West to sell fiber loops to non-facilities-based competitors at well above cost.⁷

In addition to apparently admitting that open access regulation reduces incentives to invest in network infrastructure, as the FCC and the U.S. courts have found repeatedly, the Study also acknowledges that the benefit of open access regulation – higher quality broadband Internet service - may be very small. It does so by admitting that “[w]e do not . . . attempt to measure” the extent to which open access regulations contribute to high quality broadband Internet service since “even [a] very small positive contribution” is beneficial.⁸

In balancing the costs of open access regulations with what the Berkman Study admits may be, in its words, a “very small” benefit of such regulations, the Study also ignores another important cost – the extraordinary regulatory and legal costs inherent in adopting and enforcing open access regulations in the U.S. In 2003, the FCC summarized those costs succinctly:

“This Commission and our colleagues in state commissions around the country have devoted enormous amounts of time and resources to implement . . . [open access regulations], and the industry has devoted equally large amounts of time and resources [to this effort] Few if any other . . . [activities undertaken by the Commission] have attracted so much regulatory attention, industry effort, or litigation Every aspect and application of this extraordinary . . . [regulatory undertaking] has been the focus of extensive debate and litigation.”⁹

Not surprisingly, the FCC cited these extraordinary costs as one of its reasons for reducing open access regulation.

⁷ See, e.g., <http://pcworld.about.com/od/businesscenter/Study-US-Needs-Stronger-Broad.htm>, quoting one author of a 2008 study as follows: “Japan spurred broadband competition by setting very low fees for competitors to piggyback onto incumbent DSL . . . networks That competition forced incumbent NTT to drop [its retail DSL service] prices But the line-sharing requirement on DSL actually encouraged the rollout of fiber in Japan . . . [since] while the Japanese government set rates of about \$2 a month to rent a DSL line, it set a \$50 a month rate for renting a fiber line, making it tough for competitors to offer [broadband Internet service using NTT-owned] fiber at a competitive price That encouraged NTT to roll out fiber.”

⁸ Berkman Study. at 74-75.

⁹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand, *supra*, 18 FCC Rcd. 16978 at ¶ 2.

CONCLUSION

Even if one assumes that the Berman Study correctly concludes that strong open access regulations produce marginally higher quality broadband Internet service (a conclusion that we accept for purposes of these Comments but with which we do not necessarily agree), this conclusion is only half the story since before re-instating strong open access rules, the Commission would need to show that the benefit of higher quality service produced by such regulations outweighs the cost of reduced network investment as well the extraordinary regulatory costs. As discussed above, we believe that the Commission could not meet this burden since there is considerable evidence, including both findings by the FCC and the U.S. courts as well as evidence from foreign countries with strict open access regulations, that the benefit is outweighed by the costs.

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